Supreme Court, U. S.
FILED
AUG 11 1977
MICHAEL RODAK, JR., CLERK

No. 76-1151

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

RALPH CECCOLINI

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–20a) is reported at 542 F. 2d 136. The oral opinion of the district court (Pet. App. 25a–37a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on September 15, 1976. A petition for rehearing and suggestion for rehearing *en banc* was denied on December 21, 1976 (Pet. App. 23a). Pursuant to an extension of time granted by Mr. Justice Marshall, a petition for a writ of certiorari

was filed on February 19, 1977; the petition was granted on May 2, 1977. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the exclusionary rule prevents the use of the fruits of an illegal search in a prosecution for perjury committed after the search.

2. Whether the exclusionary rule requires the suppression of the trial testimony of a witness whose identity or whose possession of relevant information was learned as the result of an illegal search.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of New York, respondent was found guilty of making a false declaration before a federal grand jury, in violation of 18 U.S.C. 1623. After finding respondent guilty, the district court then set aside the finding, ruling that

the testimony of government witness Lois Hennessey should be suppressed as the fruit of an unlawful search and that without her testimony there was insufficient evidence to support the conviction (Pet. App. 29a–32a). On the government's appeal, the court of appeals affirmed (Pet. App. 1a–20a).

1. The evidence at trial showed that in the second half of 1973 FBI agents conducted an investigation of gambling in North Tarrytown, New York, that included a surveillance of respondent's flower shop, a place that was frequently visited by Francis J. Millow, a target of the investigation. Their observations led them to conclude that the flower shop was either a drop spot or pickup spot for policy gambling operations. The surveillance was discontinued in December 1973 (A. 59–64).

About a year later, on December 18, 1974, a uniformed police officer, Ronald Biro, who had been assigned to patrol school crossings on that day, entered respondent's shop on a cigarette break. Biro was acquainted with Lois Hennessey, an employee in respondent's shop, and he went behind the customer counter and sat down next to her. As he was talking with her, Biro observed a small envelope on the top of the cash register drawer with money protruding from it.[1] Biro picked up the envelope, looked through its contents for a few minutes, observed that the envelope also contained policy slips, and put the contents

[1] The cash register was located on a table behind the counter (A. 33–34) (Tr. 556).

back in the envelope. He then placed the envelope back on the cash register (A. 25, 34–37, 41, 46, 51–56).

Biro did not inform Hennessey of what he had seen but did ask her whose envelope it was (A. 36–37, 56). Hennessey replied that it was respondent's and that respondent had told her to give the envelope to someone,[2] but she did not inform Biro who the intended recipient was. Biro then left the shop (A. 25, 36–37, 51–56). When he examined the envelope, Biro was unaware there had been a gambling investigation of the shop and had no reason to suspect that Hennessey was giving envelopes with policy wagers to Millow or anyone else (A. 56–57, 58–59).[3] One hour after Biro left, Millow came into respondent's shop and Hennessey gave him the envelope, pursuant to respondent's instructions (A. 25–26, 37).

On the following day, Biro mentioned what he had observed in the flower shop to other local police officers (A. 57) (Tr. 482), who in turn informed F.B.I. Agent A. Lance Emory that Biro had seen an envelope containing gambling records in the flower shop. Emory was not told of the circumstances in which the

[2] Respondent had placed the envelope on the cash register that morning after writing on a piece of paper, which he then put in the envelope. Respondent asked Hennessey to deliver the envelope to Millow when he came into the shop that day. Hennessey was not told what was in the envelope, nor did she look at its contents (A. 23–24, 40) (Tr. 129).

[3] Respondent was not present at the time Biro was in the shop (A. 24–25, 47–48), and Hennessey did not tell respondent about the events of that day because she "thought nothing of it" and "didn't think it was important enough to tell him" (A. 46–47).

information had been obtained, and he assumed that it had been legally obtained (A. 65–67, 70).

Approximately four months later, Emory interviewed Lois Hennessey at her home for about 15–20 minutes, in the presence of her mother and two sisters. After identifying himself, Emory told Hennessey that he had learned through the police department that she was employed by respondent and that the "Government was interested in any information she might provide regarding incidents in [respondent's shop]" (A. 37–42, 48, 67–72, 74–75). Hennessey, who was then studying police science in college and was interested in police work, said that "she would be willing to help the Government" (A. 74–75) (Tr. 390). Although Emory did not refer to the Biro incident, Hennessey told him about the events of that day (A. 38–43, 68–71, 74) (Tr. 109).

In May 1975, both Hennessey and respondent were subpoenaed to testify and did testify before a federal grand jury investigating possible gambling offenses. In his testimony on May 12, respondent unequivocally denied that he ever took policy bets at his shop either for himself or for Millow or that he ever discussed gambling business with Millow (A. 4–8).

Respondent was then indicted for making false declarations before a grand jury, in violation of 18 U.S.C. 1623, and was tried without a jury. Respondent's grand jury testimony was shown to be false at trial by the testimony of Hennessey. She testified that she had observed customers place policy and football bets with respondent and that those bets were then

given by respondent to Millow. Hennessey also testified that Millow came into respondent's shop almost daily and came in twice every Saturday during the football season, first to discuss point spreads with respondent and later to pick up bets placed by customers (A. 26–33, 40–41, 44–45).[4] A tape recording of an intercepted telephone conversation between respondent and Millow also implicated respondent in gambling activity (A. 64–65), as did the evidence of the physical surveillance of respondent's shop (A. 59–64).

2. At the conclusion of the trial, the district court found respondent guilty of perjury.[5] After making this finding, however, the court granted respondent's motion to suppress Hennessey's testimony,[6] ruling

[4] Another witness testified (A. 49–50) that she was present during a conversation between respondent and Millow on May 9, three days prior to respondent's grand jury appearance, at which Millow told respondent "[y]ou are going downtown Monday to see the big boys * * * and whatever they ask you, just tell them you don't remember, because if you don't remember, that is not lying" (A. 50).

[5] Respondent was acquitted on a second count of perjury, which charged that he had made false statements in the grand jury when testifying that he did not know that one Hank Bucci was involved in gambling operations.

[6] Before the evidence was presented, respondent had made a motion to exclude the testimony of Lois Hennessey on the ground that her identity was procured as a result of an illegal search. The court reserved decision on the motion until the trial was completed (A. 21–23). Consequently, during the trial the court heard testimony about the search of the envelope and what it disclosed from Officer Biro. However, the court stated that, in finding respondent guilty, "I excluded what were the results of the search * * *. If [the case] had gone to the jury I would have excluded, as I did from my own consideration, the envelope and the contents of the envelope * * *" (Pet. App. 35a, 36a).

that her testimony at trial was tainted by the fact that her potential as a witness "first came directly to the attention of the government as a result of an illegal search" and that the government "has not sustained its burden of showing that Lois Henness[e]y's testimony definitely would have been obtained without the illegal search" (Pet. App. 28a–29a). The court concluded that, without her testimony, there was insufficient evidence of respondent's guilt (*id.* at 32a).

3. On the government's appeal, a divided court of appeals affirmed (Pet. App. 1a–20a).[7] The court rejected the government's contention that the testimony of Lois Hennessey "was an act of free will sufficient to purge the taint of any unlawful invasion * * * on December 18, 1974" (*id.* at 12a). Noting that the F.B.I. agent had sought out Hennessey, it concluded that the district court's suppression of Hennessey's testimony was proper because "the road to Miss Henness[e]y's testimony from Officer Biro's concededly unconstitutional search is both straight and uninterrupted" (*id.* at 13a). The court also rejected the government's argument that the exclusionary rule should not be applied when the evidence derived from the search is being used to prove an independent crime, here per-

[7] The court first held (Pet. App. 7a) that the government could appeal the ruling of the district court. This conclusion was plainly correct. See *United States* v. *Martin Linen Supply Co.*, No. 76–120, decided April 4, 1977, slip op. 5; *United States* v. *Morrison*, 429 U.S. 1.

jury, that occurred after the unlawful intrusion (*id.* at 13a–15a).

Judge Van Graafeiland, dissenting, urged that the doctrine of attenuation of taint should have different application when the evidence under consideration is the testimony of a live witness. Since Hennessey was not coerced by the government into becoming a witness, and her testimony was clearly established as being the product of her " 'willingness to cooperate with the F.B.I.' " (*id.* at 18a), Judge Van Graafeiland concluded that the testimony should be admissible because the factor of the witness's willingness to cooperate sufficiently purged the taint of the prior search (*id.* at 17a–18a).

SUMMARY OF ARGUMENT

I

1. The exclusionary rule should not apply to suppress evidence obtained in, or derived from, an illegal search in the prosecution of a crime that was committed after the search occurred. Exclusion of evidence in those circumstances can have little, if any, incremental deterrent effect on police conduct, since police have little incentive to conduct searches for evidence of crimes that have not yet and may never be committed. The minimal deterrent effect of suppressing such evidence does not outweigh the substantial cost to society of applying the exclusionary rule in those circumstances.

2. There is, in any event, no basis in this case, or similar cases, for applying the exclusionary rule in the

prosecution of a subsequently committed crime. There is no evidence in the record suggesting that the search in this case was for the purpose of securing evidence for use in prosecuting a subsequent crime.

3. Even if it were ever appropriate to apply the exclusionary rule to some subsequently committed crimes, the rule should not apply in the case of subsequently committed perjury. This Court has firmly established that antecedent constitutional violations by the government provide no defense to the crime of perjury. Moreover, application of the exclusionary rule in the case of subsequently committed perjury before a grand jury would largely nullify *United States* v. *Calandra,* 414 U.S. 338, where this Court held that the imperatives of grand jury proceedings preclude witnesses from refusing to answer questions based on improperly obtained evidence.

II

Even if it were appropriate to apply the exclusionary rule to the subsequently committed crime of perjury, the court below erred in concluding that the trial testimony of a witness, whose identity or possession of relevant information was discovered as a result of police misconduct, should be suppressed as the fruit of that misconduct. This Court has not yet ruled on the question of live-witness testimony as the fruit of official misconduct, but that question has generated considerable conflict and uncertainty among the lower federal courts, as well as state courts. The question is

important to the administration of criminal law and should be resolved by this Court.

1. Principles of attenuation developed by the Court in connection with the exclusionary rule should preclude the blanket exclusion of a witness's testimony whenever it can be said that "but for" the official misconduct, the witness might not have testified. However, in our view, whether live-witness testimony should be excluded should not be resolved on a case-by-case basis in which courts attempt to decide such questions as whether and to what extent the testimony is causally related to the primary illegality, whether the testimony is sufficiently a product of free will to break the causal chain, or whether the testimony is a result of governmental exploitation of the primary illegality. Although *Wong Sun* v. *United States,* 371 U.S. 471, and *Brown* v. *Illinois,* 422 U.S. 590, establish the relevance of those questions in the context of verbal confessions following illegal arrests, they have limited utility in the case of live-witness testimony, and have generated widely disparate and inconsistent decisions in the lower federal and state courts. We submit that the issue of live-witness testimony should be resolved directly with reference to exclusionary rule policies, and thus in terms of whether the deterrent benefits of exclusion outweigh the social costs of exclusion.

2. Analysis of the question directly in terms of exclusionary rule policy requires an identification, on the one hand, of the incentives of police to engage in misconduct in order to obtain useful evidence, and, on the other hand, the consequences to society of ex-

cluding a certain type of evidence. In both respects the testimony of a witness by its nature differs significantly from other evidentiary fruits. Because of the inherent differences, police in the typical case have substantially less incentive to engage in improper searches or other misconduct to find useful witnesses, and the exclusion of a witness's testimony would have a commensurately less deterrent effect on police conduct. At the same time, the perpetual disqualification of a witness and all that witness knows imposes a significantly greater cost to society than the exclusion of other kinds of evidence. While the exclusion of testimony that merely describes other kinds of tainted evidence may be a necessary concommitant of the exclusionary rule, the exclusion of testimony by a witness concerning other matters does not in the ordinary case provide sufficient incremental deterrence to outweigh its social costs.

3. The only circumstances in which the exclusion of a witness's testimony would significantly serve the deterrent objectives of the rule would be when the police engage in a search or other misconduct for the specific purpose of discovering witnesses. While such an exception would be appropriate to the rule we suggest, this case clearly does not fall within it.

4. If the criteria set forth in *Wong Sun* and *Brown* v. *Illinois* were appropriate to the question of live-witness testimony, Hennessey's testimony should not have been suppressed. Her testimony was the product of her free will and was substantially removed in time from the initial search. The government did not ex-

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ploit the initial search, and that search was not flagrant or purposeful.

ARGUMENT

I. THE COURTS BELOW ERRED IN SUPPRESSING EVIDENCE IN A PROSECUTION FOR PERJURY COMMITTED AFTER AN ILLEGAL SEARCH

A. THE EXCLUSIONARY RULE SHOULD NOT APPLY TO SUPPRESS EVIDENCE IN PROSECUTIONS FOR CRIMES COMMITTED AFTER AN ILLEGAL SEARCH

1. Assuming arguendo that Hennessey's testimony is an otherwise excludable fruit of Officer Biro's search of the envelope (but see Part II, *infra*) the courts below erred in suppressing that testimony in a prosecution for a crime committed after the search took place. If suppression of evidence has any deterrent effect on police conduct in those circumstances, it is negligible and surely does not outweigh the societal cost of excluding the evidence.[8]

Many decisions of this Court have made clear that the principal, if not the exclusive, purpose of the exclusionary rule is to deter official misconduct. See *e.g., Stone* v. *Powell,* 428 U.S. 465, 486; *United States* v. *Janis,* 428 U. S. 433, 446; *United States* v. *Peltier,* 422 U.S. 531, 536–539; *United States* v. *Calandra,* 414

[8] Although it is only necessary in this case to consider the suppression of the testimony of Hennessey, our argument in Part I, that the exclusionary rule should not apply to subsequently committed crimes, would also encompass tangible fruits of an antecedent search. As previously noted, n. 6, *supra*, the trial court excluded from his consideration the envelope and its contents, and while our argument would pertain to that ruling as well, it does not separately address it.

U.S. 338, 347. The Court has recognized, moreover, that the salutary societal goals of the exclusionary rule unfortunately entail substantial societal costs and that the nature and extent of the rule's impact on police conduct has not been clearly demonstrated. See, *e.g., United States* v. *Janis, supra,* 428 U.S. at 448–453; *Stone* v. *Powell, supra,* 428 U.S. at 489–491. Consequently, as the Court said in *United States* v. *Calandra, supra,* 414 U.S. at 348: "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."[9]

In accordance with those principles, the Court has declined to apply the exclusionary rule in a variety

[9] While the Court has also justified the rule on the basis of principles of "judicial integrity" that make courts unwilling to become a "party to lawless invasions of constitutional rights" (*Terry* v. *Ohio*, 392 U.S. 1, 13; *Elkins* v. *United States*, 364 U.S. 206), the Court has recently explained that those principles require "essentially the same [inquiry] as the inquiry into whether exclusion would serve a deterrent purpose." *United States* v. *Janis*, 428 U.S. 433, 458–459, n. 35. That is, principles of judicial integrity preclude the courts from admitting evidence that would significantly encourage (or fail to deter) future invasions of constitutional rights. *Ibid.* But, as the Court said in *Michigan* v. *Tucker*, 417 U.S. 433, 450, n. 25, the rationale of judicial integrity does not furnish "an independent basis for excluding challenged evidence." See also *United States* v. *Peltier*, 422 U.S. 531, 536–539; *United States* v. *Calandra*, 414 U.S. 338, 355–356, n. 11.

of contexts in which the deterrent effect of exclusion does not outweigh the cost to society that would result from excluding the evidence. For example, in *Calandra* the Court declined to prohibit the government from asking a grand jury witness questions based on information obtained in an illegal search. The Court observed that such an "extention of the exclusionary rule would seriously impede the grand jury" and stated that "[a]ny incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best" (414 U.S. at 349, 351). And in *Janis* the Court declined to apply the exclusionary rule to bar evidence illegally seized by a state officer from admission in a federal civil tax proceeding, reasoning that "the additional marginal deterrence provided by forbidding a different sovereign from using the evidence in a civil proceeding surely does not outweigh the cost to society of extending the rule to that situation" (428 U.S. at 453–454). On the one hand, the Court found that enforcement of the tax laws "would be hampered by so extending the exclusionary rule" (*id.* at 447). On the other hand, the Court regarded an extension of the rule to civil tax proceedings brought by another sovereign as likely to have little marginal deterrent effect, reasoning that such misconduct as would not be deterred by the suppression of any unlawfully seized evidence in both state and federal criminal proceedings was unlikely to be deterred by the added sanction of exclusion in a civil tax case. On this bal-

ance of the competing interests, the Court viewed an extension of the exclusionary rule to be "an unjustifiably drastic action by the courts in the pursuit of what is an undesired and undesirable supervisory role over police officers" (*id.* at 458). Similarly in *Michigan* v. *Tucker,* 417 U.S. 433, the Court held that the exclusionary principle of *Miranda* v. *Arizona,* 384 U.S. 436, did not apply to bar the testimony of a witness who was identified by the defendant in the course of questioning that followed inadequate warnings, in part on the ground that the "deterrent effect on future police conduct [of] the exclusion of [the defendant's] statements * * * would [not] be significantly augmented by excluding the testimony of the witness * * * as well" (417 U.S. at 448).[10]

In each of the foregoing cases, the Court recognized the dispositive factor to be the degree of additional deterrence that suppression could be expected to provide in the particular circumstances. In each case, the Court concluded that, in view of the fact that the exclusionary rule already required suppression in other contexts, suppression in the circumstances presented, on the basis of the same police conduct, would

[10] A similar analysis underlies decisions declining to apply the exclusionary rule retroactively (see, *e.g.*, *United States* v. *Peltier*, *supra*, 422 U.S. at 536–539, 542; *Desist* v. *United States*, 394 U.S. 244, 249–251, 254, n. 24; *Linkletter* v. *Walker*, 381 U.S. 618, 636–637) and denying standing to persons who were not themselves the victim of unconstitutional searches (see, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 229; *Alderman* v. *United States*, 394 U.S. 165, 174–175; *Wong Sun* v. *United States*, 371 U.S. 471, 492).

not provide sufficient additional deterrence to outweigh the substantial societal costs of exclusion.

Those principles are fully applicable to this case. The question here is whether suppression of the fruits of a search in a prosecution for a crime committed after the search would provide sufficient additional deterrence of police misconduct to outweigh the harm resulting from exclusion. We submit that it clearly does not; indeed, there are few circumstances in which suppression could have less of a deterrent effect.

There is no question in this case that the evidence discovered in Officer Biro's search cannot be used in any prosecution of respondent for substantive gambling offenses or any other offenses, committed by respondent before the search.[11] By virtue of this fact, the exclusionary rule has served as well as it can its principal objective of removing the incentive of police officers to engage in similar searches.[12]

However zealous police may be, the cases are surely rare in which they would have any substantial incentive to search illegally for evidence of crimes that have not yet been, and may never be, committed. Accordingly, suppression of evidence in a prosecution for a

[11] Whether the testimony of Lois Hennessey could be used in such a prosecution is another question, which we address in Part II, *infra*.

[12] How effectively the rule has achieved the objective of deterring police misconduct is, of course, a matter of considerable controversy.

crime committed after the search is likely to have little effect on police conduct. Officers who will not be deterred by the prospect that an illegal search will substantially jeopardize the prosecution of a crime that has already been committed are most unlikely to stay their hand at the thought that any evidence they find might also be inadmissible in the event the target of their search subsequently commits a crime as to which the evidence is relevant.[13]

Indeed, the potential for deterrence is significantly less here than in other circumstances in which this Court has declined to apply the exclusionary rule. In every case so far considered by the Court, the evidence sought to be used pertained to offenses committed before the search took place, and there was at least some basis for arguing that police would retain considerable motive for seeking evidence by improper means if they knew that, even though the evidence could not be used directly in a prosecution for those offenses, it could be used effectively against the offender in other ways. Thus, for example, in *United States* v. *Janis, supra,* 428 U.S. at 463, Mr. Justice Stewart, dissenting, expressed concern that failure to suppress evidence illegally seized by state officers in a federal civil tax case would encourage state officers

[13] If deterrence plays any part in that situation, it would act on the criminal. If the victim of a search knows that evidence seized in a search may be used against him with respect to future crimes, he may well be deterred from committing those crimes.

to "crack down on gambling law violators by the simple expedient of violating their constitutional rights and turning illegally seized evidence over to Internal Revenue Service agents * * *." [14] Here there is no basis for even that kind of concern. With respect to crimes not yet committed, police officers have no basis for supposing with any degree of confidence that the evidence they obtain can ever be used against the subject of the search under any circumstances. All they can know for certain is that an illegal search may jeopardize the prosecution of crimes that have already been committed.

On the other side of the balance, the negligible deterrent effect in these circumstances would be purchased at a high cost to society. This Court has often noted that in any case in which probative evidence is excluded, the suppression of evidence significantly impairs society's ability to enforce its criminal laws. In many cases, including this one, suppression prevents enforcement altogether. Furthermore, in some cases, the suppression of evidence in the prosecution of crimes committed after the police misconduct may have a special consequence in addition to those often noted in the ordinary case, by providing the target of the search with some greater assurance that his commission of a subsequent crime to which the evidence

[14] See also *Oregon* v. *Hass*, 420 U.S. 714, 724–726 (Mr. Justice Brennan, joined by Mr. Justice Marshall, dissenting); *Harris* v. *New York*, 401 U.S. 222, 232 (Mr. Justice Brennan, joined by Mr. Justice Douglas and Mr. Justice Marshall, dissenting).

was relevant would go unpunished—that is, providing him with some degree of license to commit crimes in the future.[15] In sum, the virtually non-existent

[15] Although apparently not critical to its decision, the court below noted that respondent was unaware of the prior search when he testified and lied to the grand jury (Pet. App. 14a). While there is no doubt something especially offensive about crimes committed in reliance upon an expectation that the exclusionary rule will prevent their successful prosecution—and while we do not dispute the court of appeals' finding that this is not such a case—the decision whether to apply the exclusionary rule to this class of cases should not depend upon the presence or absence of exploitation of this sort in the particular case, because the factor is wholly unpredictable at the time of the search and thus could not possibly influence police behavior. See pp. 21–22, *infra*.

Whether suppression in the prosecution of subsequently committed crimes would in fact encourage crime to any significant extent is perforce speculative, although with respect to the subsequent crime of perjury, it is not improbable and has been suggested by this Court. See, *e.g.*, *Oregon* v. *Haas*, 420 U.S. 714, 722 ("The shield provided by *Miranda* is not to be perverted to a license to testify * * * perjuriously * * *"). But the effectiveness of the exclusionary rule depends not only on its impact on police and criminal conduct but also in large part upon the public's acceptance of the rationality of the rule's foundations. Thus, in *Stone* v. *Powell*, *supra*, 428 U.S. at 490–491, the Court emphasized that the rule must reflect "the idea of proportionality that is essential to the concept of justice. Thus, although the rule is thought to deter unlawful police activity in part through the nurturing of respect for Fourth Amendment values, if applied indiscriminately[,] it may well have the opposite effect of generating disrespect for the law and administration of justice [footnote omitted]." In short, apart from its actual impact on criminal behavior, it would certainly offend common sense notions of proportionality if the exclusionary rule were extended to provide that the target of an unlawful search could thereafter commit a crime without risk that evidence disclosed in that search, or its fruits, could be used against him.

marginal deterrent effect of suppression on police misconduct from application of the exclusionary rule in these circumstances surely does not justify the substantial cost to society that would result.

2. Although the issue of the application of the exclusionary rule to subsequent crimes has not often arisen, the decision below is the only one we are aware of in which the court held the rule applicable to crimes committed after the search. Three circuits have ruled the other way In *United States* v. *Turk*, 526 F. 2d 654 (C.A. 5), certiorari denied, 429 U.S. 823, and *United States* v. *Raftery*, 534 F. 2d 854 (C.A. 9), certiorari denied, 429 U.S. 862, the courts held that the rule does not require the suppression of illegally seized evidence in prosecutions for perjury committed after the search, reasoning that the marginal deterrent effect of suppression in those circumstances is minimal and does not outweigh the substantial public interest in preventing perjured testimony. Following the reasoning of those decisions, the Seventh Circuit held in *United States* v. *Paepke*, 550 F. 2d 385 (decided after the decision below), that the exclusionary rule did not apply to bar the admission of tangible evidence, discovered as the result of an illegal search in 1971, in a federal prosecution charging the defendant with having willfully understated his gross income and having misrepresented its source in a tax return filed by the defendant in 1972. The court concluded that it was

clearly unforeseeable to the police officers conducting the unlawful search that the defendant would subsequently commit tax fraud and that accordingly "any additional deterrent effect resulting from the exclusion of the evidence is outweighed by the necessity of preserving the self-reporting system of the United States tax structure." *Id.* at 393.

In contrast to those decisions, the court below mechanically applied the exclusionary rule without consideration of its policies, stating merely that "we do not understand the government's position to be the law" (Pet. App. 14a). Although the court also observed that the defendants in *Turk* and *Raftery*, unlike respondent, were aware of the illegal searches when they testified falsely, any distinction on that basis is unsound.[16] While we agree that it would be particularly outrageous to permit a person to commit a crime in the conscious expectation that the exclusionary rule will protect him from punishment, a defendant's ignorance of a prior illegal search provides no basis for applying the rule to crimes committed after the search. The purpose of the exclusionary rule is to deter police misconduct, not to reward criminals (*United States* v. *Calandra, supra*, 414 U.S. at 347–348). Whether a person subsequently becomes aware that he was the target of an illegal search can have no relevance to the prior decision of

[16] It is not clear from the opinion whether the court intended to limit its holding in that respect (see Pet. App. 14a).

the police to conduct the search.[17] Moreover, in many cases it may not be possible to prove whether the defendant knew of a prior illegal search, and the application of the exclusionary rule should not turn on the fortuities of proof available to show the defendant's knowledge of a fact.[18]

[17] It could perhaps be argued that police may speculate that a target will not become aware of a search and will subsequently lie about the evidence disclosed in the search when he is subpoenaed by a grand jury, and that the police will thus be encouraged to conduct illegal searches in order to trap suspects into committing perjury. Such speculation is extremely farfetched and certainly does not support a general rule requiring suppression in connection with subsequent crimes. In order for police to have a significant incentive in that respect, they would have to proceed upon the dubious assumption that all of the following conditions would be met: that they will discover incriminating evidence; that the target of the search will remain unaware of the search; that he will be subpoenaed to testify; that he will testify falsely rather than tell the truth or assert his Fifth Amendment privilege; and that the evidence discovered will be sufficient to prove his perjury. And against that speculation, of course, will stand the likelihood that whatever probative evidence they discovered could not be used against the target of the search for any crimes that have already been committed.

Such concerns, it may be noted, have no application to circumstances like the present case, where the officer conducting the search was unaware that respondent was engaged in illegal activity or that he had been under investigation.

[18] If the court of appeals' distinction is based on some notion that witnesses should not be able to take advantage of the rule by lying boldly in the expectation that the government, though aware of the lie, will not be able to prove it, then the government should have to prove not only that the witness knew of the search, but also that he "knew" it was illegal, and further, that he would have standing to assert its illegality. Unless a court happened to have ruled squarely on those issues and that ruling was not subject to later reversal on appeal or collaterally in another jurisdiction, it is difficult to see how the government could prove a witness "knew" something that constitutes a legal conclusion, and, further, a conclusion that may not be finally established until years after the fact.

In short, the court below erred when it applied the exclusionary rule to a situation in which its deterrent effect is minimal and the corresponding costs to the public are substantial. As this Court noted in *Nardone* v. *United States,* 308 U.S. 338, 340: "Any claim for the exclusion of evidence logically relevant in criminal prosecutions is heavily handicapped. It must be justified by an over-riding public policy expressed in the Constitution or the law of the land." See also *Lopez* v. *United States,* 373 U.S. 427, 440. And in the words of Chief Justice Burger, "[t]o vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention—and surely its *extension*—to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law." *Stone* v. *Powell, supra,* 428 U.S. at 499–500 (Burger, *C. J.*, concurring) (emphasis in original). In our view, that showing cannot be made where evidence is sought to be excluded in the prosecution of a crime committed after the search.

3. While one must recognize that in some circumstances police might conduct a search for the specific purpose of discovering evidence of a yet-

to-be committed crime, and in which the exclusionary rule might serve some useful purpose, those instances are surely rare. But this case affords no occasion to consider whether the exclusionary rule would *ever* be appropriate in connection with subsequent crimes, because the facts furnish no basis for concluding that the search here was for such a purpose or that application of the rule would provide any marginal deterrence in these or similar circumstances.

The evidence in this case was undisputed that when Officer Biro looked in the envelope in respondent's shop he was not aware that the shop had been investigated for gambling a year before or that Hennessey was giving envelopes with policy wagers to Millow or anyone else—let alone that respondent might be called before a grand jury months later. It is clear, therefore, that Biro could not have been motivated to conduct the search by the hope of discovering tangible evidence or a witness that could provide proof of respondent's subsequent perjury. The usefulness of Hennessey as a witness at a later prosecution for perjury was the result of mere happenstance, and fell well "outside the offending officer's zone of primary interest." *United States* v. *Janis, supra,* 428 U.S. at 458. The connection between the search of the envelope and the testimony of the witness at respondent's later prosecution for perjury is so indirect and attenuated that reliance on the deterrence rationale in these circumstances would be illusory and capricious. As in *Stone* v. *Powell, supra,* 428 U.S. at 491, the disparity between the police officer's conduct and the windfall to the defendant by the suppression of the testimony, rather than "nurturing * * * respect for Fourth Amendment values * * * may well have the opposite effect of generating disrespect for the law and administration of justice."

B. THE EXCLUSIONARY RULE SHOULD NOT APPLY IN ANY EVENT TO THE SUBSEQUENT CRIME OF PERJURY

We have argued in the preceding section that the exclusionary rule would ordinarily serve no useful purpose when applied at trials for subsequently-committed crimes, regardless of the character of those crimes. But even if it were thought that the rule might have a meaningful function in the case of some subsequently committed crimes, it should have no place when the subsequent offense is perjury. Perjury directly undermines the administration of justice itself, and accordingly this Court has consistently rejected defenses to the charge based on allegations of prior improper acts by the government. Moreover, to apply the exclusionary rule in cases of grand jury perjury would effectively subvert this Court's decision in *United States* v. *Calandra, supra.*

1. This Court has never excused perjury on the grounds of antecedent misconduct of the government or even on the ground that the witness's very obligation to answer the question violated his constitutional rights. Thus, in *Bryson* v. *United States,* 396 U.S. 64, this Court affirmed a conviction for making false

statements in an affidavit required to be made by a statute, rejecting as irrelevant the defendant's contention that the statutory requirement was unconstitutional. The Court stated (*id.* at 72):

> [I]t cannot be thought that as a general principle of our law a citizen has a privilege to answer fraudulently to a question that the Govment should not have asked. Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them. A citizen may decline to answer the question, or answer it honestly, but he cannot with impunity knowingly and willfully answer with a falsehood [footnote omitted].[19]

In accordance with those principles, the Court recently held that grand jury witnesses prosecuted for perjury could not obtain suppression of their allegedly false grand jury testimony on the ground that they had not been adequately informed of their Fifth Amendment privilege against self-incrimination. *United States* v. *Wong,* No. 74–635, decided May 23, 1977; *United States* v. *Mandujano,* 425 U.S. 564. As the Court stated in *Wong* (slip op. 4), "the Fifth Amendment privilege does not condone perjury. It grants a privilege to remain silent without risking contempt, but it 'does not endow the person who testi-

[19] See also *United States* v. *Knox*, 396 U.S. 77, where the Court held that even where a statute compels a person to provide incriminating information in violation of his Fifth Amendment rights, the person may be punished for committing perjury in response to the compulsion.

fies with a license to commit perjury.' *Glickstein* v. *United States,* 222 U.S. 139, 142 (1911)."[20]

Although this Court has not hitherto had occasion to consider the use of illegally obtained evidence directly in the prosecution of subsequently committed perjury, it has for many years been the rule, on a rationale like that of the cases just discussed, that such evidence may be used to rebut the false testimony of a defendant in a trial on other charges. See *Walder* v. *United States,* 347 U.S. 62. Similarly in *Harris* v. *New York,* 401 U.S. 222, 225, the Court permitted the government to use the defendant's statements, obtained without adequate *Miranda* warnings, to impeach the defendant's inconsistent testimony at trial, stating that "[the Fifth Amendment] privilege cannot be construed to include the right to commit perjury." See also *Oregon* v. *Hass,* 420 U.S. 714, 722.

Although those cases dealt with the use of evidence for impeachment, their principles should control the issue here. The proposition that illegally obtained evi-

[20] While the foregoing cases considered defenses to perjury based on alleged Bill of Attainder Clause or Fifth Amendment violations, their rationale should apply with even greater force to antecedent Fourth Amendment violations, where the perjurer's defense is not that the questions themselves directly violated his constitutional rights but rather that proof of his perjury should be precluded by a judicially created prophylatic rule that was designed to promote official compliance with the Fourth Amendment, not to create "a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, *supra*, 414 U.S. at 348.

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dence can be used to impeach subsequent perjury but not to punish it directly would largely vitiate the principle that antecedent constitutional violations do not provide a witness with a "right to commit perjury", since in many cases a witness could in fact lie without significant risk of punishment for perjury. But this Court has made clear that respondent had no such right. He could have answered the questions truthfully or refused to answer them at all. But, like the defendants in other perjury cases considered by this Court, he had no right to "knowingly and willfully answer with a falsehood." *Bryson, supra,* 396 U.S. at 72.[21]

2. The foregoing considerations apply with special force to perjured grand jury testimony. Indeed the exclusion of evidence obtained in a search from the prosecution of subsequent perjury before a grand jury would largely nullify the decision in *United States* v. *Calandra, supra,* where the Court held that the imperatives of grand jury proceedings precluded any right on the part of a witness to refuse to answer questions based on evidence obtained in violation of the Fourth Amendment.

[21] There is, in any event, little basis for distinguishing the use of evidence for impeachment and its use to prosecute directly for perjury. In both situations the evidence is used against subsequent perjury, and its use is necessary to protect the judicial process from false testimony. Moreover, the evidence may well be as damaging to the defendant when used for impeachment as when used directly to prosecute for perjury. See *Stone* v. *Powell, supra,* 428 U.S. at 485.

In *Calandra,* the Court reaffirmed the "special role [of the grand jury] in insuring fair and effective law enforcement" and stated that "[t]he grand jury's investigative power must be broad if its public responsibility is adequately to be discharged." 414 U.S. at 343, 344. The Court also noted that "[t]he duty to testify has long been recognized as a basic obligation that every citizen owes his Government," and that that duty is "particularly applicable to grand jury proceedings." *Id.* at 345, quoting from *Branzburg* v. *Hayes,* 408 U.S. 665, 688. The Court concluded that "allowing a grand jury witness to invoke the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties." 414 U.S. at 350.

Certainly the duty to testify and to respond to questions based on improperly obtained evidence necessarily implies the duty to testify truthfully. But to contend that a witness may nevertheless lie in response to such questions without risk that the same evidence could be used to punish his lie would make a mockery of the commands of *Calandra* and render that decision largely ineffectual. Surely false testimony interferes with the grand jury's effective discharge of its duties at least as much as the witness's refusal to testify at all.[22]

[22] *Calandra*, of course, was based not only on the grand jury's need for broad investigative powers requiring its consideration of probative evidence regardless of its source, but also on the disruption of its functions that would follow from litigation of a wit-

II. THE COURT BELOW ERRED IN CONCLUDING THAT THE TRIAL TESTIMONY OF LOIS HENNESSEY SHOULD HAVE BEEN SUPPRESSED AS THE FRUIT OF AN ILLEGAL SEARCH

This case squarely presents another issue as important to the administration of justice, and far more common, than the application of the exclusionary rule to subsequent crimes—namely, whether all of the trial testimony of a witness whose possession of relevant information was discovered as the result of an illegal search should be suppressed as the fruit of that search. On previous occasions, when the issue was not briefed, this Court has reserved decision on it (*e.g.*, *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 876, n. 2; *Harrison* v. *United States,* 392 U.S. 219, 223, n. 9), and, as Judge Van Graafeiland noted in his dissent below (Pet. App. 17a, n. 3), there is a "marked difference" of opinion among the courts of appeals on the question.

The question whether all of a witness's testimony should be suppressed as the fruit of police misconduct poses considerable analytical difficulty. On the one hand, common sense and many courts resist the proposition that a witness, and all that that witness knows

ness's invocation of the exclusionary rule to resist answering questions. 414 U.S. at 350. While the application of the exclusionary rule in a subsequent prosecution for perjury does not threaten the kind of delay considered in *Calandra*, the ability of a witness to lie to the grand jury without significant risk of punishment for the lie threatens the functioning of the grand jury at least as much as a witness's invocation of the exclusionary rule in refusing to answer questions at all.

about relevant events, should be entirely suppressed when knowledge of the witness's potential utility is the fruit of some police misconduct.[23] On the other hand, given that physical evidence derived from an illegal search is subject to exclusion, it is not readily apparent why information inside a witness's head should be treated differently.

The court below was unwilling to recognize any difference. It affirmed the suppression of Hennessey's testimony concerning her personal knowledge of respondent's gambling activities because "the road to Miss Henness[e]y's testimony * * * is both straight and uninterrupted * * *" (Pet. App. 13a). We submit that the court erred in failing to distinguish live-witness testimony from other kinds of evidentiary fruits. We submit that fundamental policies underlying the exclusionary rule, particularly as identified in this Court's decisions concerning the attenuation of tainted evidence, warrant the admission of that kind of testimony.

We proceed first to set forth what we perceive to be the appropriate frame of analysis and, second, to apply that analysis to the relevant similarities and differences between the testimonial evidence such as that involved in this case and other kinds of evidentiary fruits.

[23] See Ruffin, *Out on a Limb of the Poisonous Tree: The Tainted Witness*, 15 U.C.L.A. L. Rev. 32 (1967) (hereinafter "Ruffin"); *Smith* v. *United States*, 324 F. 2d 879, 881–882, n. 2 (C.A.D.C.), certiorari denied, 377 U.S. 954.

A. THE ISSUE OF ADMISSIBILITY OF LIVE-WITNESS TESTIMONY ALLEGED TO BE THE FRUIT OF AN ILLEGAL SEARCH SHOULD BE RESOLVED ON THE BASIS OF EXCLUSIONARY RULE POLICY RATHER THAN THE CASE-BY-CASE ATTENUATION ANALYSIS APPLIED TO PHYSICAL EVIDENCE AND CONFESSIONS

1. The evolution of traditional fruits/attenuation analysis

The fruits doctrine, although perhaps implicit in the exclusionary rule established in *Weeks* v. *United States,* 232 U.S. 383, was first applied by this court in *Silverthorne Lumber Company* v. *United States,* 251 U.S. 385, where the government had discovered documents in the course of an unlawful search and seizure and then sought to use its knowledge of the existence of the documents to compel the defendants to produce the documents under a subpoena. In those circumstances, Justice Holmes stated that the "essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all" (*id.* at 392).[24] He went on to observe, however, that facts that have been unlawfully discovered do not necessarily "become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others * * *" (*ibid.*).

Justice Holmes' broad statement was made in connection with a rather obvious and direct application of the fruits doctrine, and this Court has since made

[24] For the extent to which Justice Holmes' statement continues to apply to grand jury proceedings, see *United States* v. *Calandra, supra,* 441 U.S. at 352, n. 8.

clear that at some point on a chain of evidence that may be said to have its origins in some police misconduct, public policy requires that the exclusionary rule cease to apply.[25] Thus in *Nardone* v. *United States,* 308 U.S. 338, the defendant contended that the evidence introduced against him at trial had been derived from an illegal wiretap. Although the Court remanded to permit the defendant an opportunity to prove that claim, it stressed that the degree to which derivative evidence should be suppressed depends upon a proper accommodation between "two opposing concerns * * *: on the one hand, the stern enforcement of the criminal law; on the other, protection of that realm of privacy left free by Constitution and laws * * *" (*id.* at 340). Significantly, Mr. Justice Frankfurter went on to state (*id.* at 341):

> Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such a connection may have become so attenuated as to dissipate the taint.[26]

[25] Principles of attentuation are separate and distinct from the principles of independent source referred to in *Silverthorne,* although the cases sometimes blur the distinction. The principle that derivative evidence can be so remote from the primary illegality to dissipate the taint presupposes that the evidence is not, strictly speaking, "independent source" evidence; rather it is evidence that comes to light through a causal chain tracing back to the illegality.

[26] On remand the court of appeals affirmed the district court's findings that the evidence had not been derived from the illegal

The attenuation principle has been applied to verbal as well as physical fruits, and the relevant considerations have been most thoroughly expounded in *Wong Sun* v. *United States,* 371 U.S. 471, and *Brown* v. *Illinois,* 422 U.S. 591. In *Wong Sun* the Court held that statements by defendant Toy concerning the location of narcotics and his role in their sale, which were made shortly after his illegal arrest, were the "direct result" of the arrest. The Court held that the statements should have been suppressed as against Toy because "the policies underlying the exclusionary rule [do not] invite any logical distinction between physical and verbal evidence" and because under the circumstances it was "unreasonable to infer that Toy's response was sufficiently an act of free will to purge the primary taint of the unlawful invasion"[7] (371 U.S. at 486). The Court also held that narcotics dis-

wiretaps or other illegally seized evidence, *United States* v. *Nardone,* 127 F. 2d 521 (C.A. 2), certiorari denied, 316 U.S. 698. While the evidence established that wiretaps and other tainted evidence had persuaded the federal agents that the defendant was implicated in a crime and thus provided the impetus for the investigation and eventual prosecution, Judge Hand emphatically rejected the proposition that "a prosecution must show, not only that it has not used any information illicitly obtained * * * but that the information has not itself spurred the authorities to press an investigation which they might otherwise have dropped" (127 F. 2d at 523). That conclusion is pertinent to the similar circumstances of the case at bar. See discussion, *infra,* pp. 56–57, n. 50.

[7] The Court held, however, that neither the statements nor their fruits should be suppressed in the case against Wong Sun, since his rights were not infringed by Toy's arrest. 371 U.S. at 492.

covered as a result of those statements should have been suppressed, but it stated (*id.* at 487–488):

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." * * *

The Court applied those principles to conclude that the confession of Wong Sun, made several days after his illegal arrest, should not be suppressed: "On the evidence that Wong Sun had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make the statement, we hold that the connection between the arrest and the statement had 'because so attenuated as to dissipate the taint.' *Nardone* v. *United States,* 308 U.S. 338, 341" (371 U.S. at 491).

In *Brown* v. *Illinois, supra,* the Court reaffirmed those principles in the case of a defendant who made incriminating statements several hours following his illegal arrest and after he had been given *Miranda* warnings. The Court concluded that although the statements may have been voluntary and obtained in compliance with *Miranda* requirements, they were not "sufficiently a product of free will to break, for

Fourth Amendment purposes, the causal connection between the illegality and the confession." 422 U.S. at 603. In reaching that conclusion, the Court in *Brown* significantly refined the *Wong Sun* analysis by identifying a number of factors relevant to determining whether verbal evidence is sufficiently attenuated to purge the primary taint (*id.* at 603–604; footnotes and citations omitted):

> No single factor is dispositive. • • • The *Miranda* warnings are an important factor • • •. The temporal proximity of the arrest and the confession, the presence of intervening circumstances • • •, and particularly, the purpose and flagrancy of the official misconduct are all relevant.

2. The case-by-case attenuation analysis of Wong Sun *and* Brown *provides unsatisfactory results when applied to live-witness testimony*

Although *Wong Sun* and *Brown* did not deal with the trial testimony of a witness, the courts of appeals have generally applied the same analysis and considered the kinds of factors identified in *Brown* in deciding whether to suppress the trial testimony of a witness whose identity or possession of relevant information first came to light as the result of some police misconduct.[28] Following the approach of *Wong*

[28] See *United States* v. *Scios*, C.A.D.C., No. 75–1619, decided August 23, 1976, pending on rehearing *en banc*; *Brown* v. *United States*, 375 F. 2d 310 (C.A.D.C.), certiorari denied, 388 U.S. 915; *Smith* v. *United States*, 344 F. 2d 545 (C.A.D.C.); *Edwards* v. *United States*, 330 F. 2d 849 (C.A.D.C.); *McLindon* v. *United States*, 329 F. 2d 238 (C.A.D.C.); *Smith* v. *United States*, 324 F.

Sun and *Brown*, the inquiry in these cases has tended primarily to focus, with varying emphasis, on such concepts as causal relationship, intervening act of free will, exploitation, and the temporal proximity between the primary illegality and the testimony.

We beli however, that there are significant limitations to a g live-witness testimony primarily in those terms on a case-by-case basis—limitations that are reflected in the pattern of inconsistent decisions of the courts of appeals and that have added unnecessary burdens and uncertainties to the administration of justice. Concepts of causation and inter-

2d 879 (C.A.D.C.), certiorari denied, 377 U.S. 954; *United States* v. *Marder*, 474 F. 2d 1192 (C.A. 5); *Parker* v. *Estelle*, 498 F. 2d 625 (C.A. 6), certiorari denied, 421 U.S. 963; *United States* v. *Crouch*, 528 F. 2d 625 (C.A. 7), certiorari denied, 429 U.S. 900; *United States* v. *Hoffman*, 385 F. 2d 501 (C.A. 7), certiorari denied, 390 U.S. 1031; *United States* v. *Evans*, 454 F. 2d 813 (C.A. 8), certiorari denied, 406 U.S. 969; *United States* v. *Beasely*, 485 F. 2d 60 (C.A. 10), certiorari denied, 416 US. 941; see also *Lockridge* v. *Superior Court*, 3 Cal. 3d 166, 474 P. 2d 683 (Sup. Ct.), certiorari denied, 402 U.S. 910; cf. *United States* v. *Karathanos*, 531 F. 2d 26 (C.A. 2), certiorari denied, 428 U.S. 910; *United States* v. *Tane*, 329 F. 2d 848, 853 (C.A. 2); *People* v. *Scharfstein*, 52 Misc. 2d 976, 277 N.Y.S. 2d 516 (Sup. Ct.).

Some courts, however, like the court below, have simply applied the exclusionary rule mechanically to suppress testimony whenever it could be said that the testimony might not have been given but for the primary illegality. See *United States* v. *Guana-Sanchez*, 484 F. 2d 590 (C.A. 7), certiorari granted, 417 U.S. 967, certiorari dismissed as improvidently granted, 420 U.S. 513; *Williams* v. *United States*, 382 F. 2d 48 (C.A. 5); *United States* v. *Alston*, 311 F. Supp. 296 (D. D.C.); *People* v. *Dannic*, 52 Misc. 2d 1012, 277 N.Y.S. 2d 331 (Sup Ct.); cf. *United States* v. *Karathanos*, *supra*; *United States* v. *Tane*, *supra*.

vening acts function adequately with respect to physical and even non-testimonial verbal fruits by serving as an understandable and relatively practical means of implementing underlying exclusionary rule policies. However, as we shall discuss, they break down and produce anomalous results when applied to live-witness testimony, primarily because of the inevitable intrusion of a complex of "intervening causes" that are usually referred to loosely as the witness's "free will." Accordingly we suggest that the proper focus of the inquiry should be directly upon the policies of the exclusionary rule and on the question whether as a matter of policy the deterrence benefits of exclusion of live-witness testimony justify its social cost."

A. Causation and volition

With respect to the question of live-witness testimony, the concepts of causation and volition do not significantly advance the inquiry because, in the final analysis, those concepts rest on philosophical and linguistic assumptions that are not capable of objective resolution and that are susceptible to manipulation to reach almost any desired result. If causation alone were determinative of whether an item of evidence is to be excluded, and if "cause" is given one of its philosophically acceptable and commonly understood meanings as an event that is a necessary (although perhaps not sufficient in itself) condition of a subse-

[29] To the extent that the analysis and factors of *Wong Sun* and *Brown* are properly applicable to the question of Hennessey's testimony, they would clearly dictate its admission, as we discuss in Part II (D), *infra*, pp. 61–62.

quent event,[30] then there would be no attenuation doctrine at all; however remote from the primary illegality, the evidence would be excluded if it could be traced along the chain of evidence to the original sin.[31] To refine the concept with such terms as "direct result," "proximate cause," "intervening cause" and "breaks in the causal chain" does not significantly assist the inquiry. To pose the question concretely, was Hennessey's testimony more "proximately" the result of Officer Biro's search or of the "intervening causes" of Agent Emory's decision (which he might have made even without the search) to interview her and of her decision to testify (which she might in any event have volunteered to do)? Philosophers would probably differ. And as this case illustrates, so long as the inquiry is cast in those terms, rational judges will continue to reach equally plausible but contrary conclusions.[32]

[30] See Hume, *An Essay on Human Understanding*, § VII (1748). See also Prosser, *Law of Torts*, § 41, p. 239 (4th ed. 1971). One commentator on the exclusionary rule as it relates to witnesses states "What is demanded is that there be identified not simply the necessary or sufficient conditions, but *the* cause, the 'proximate' or 'efficient' or 'responsible' cause—the force that 'activated' or 'compelled' the result * * *." Ruffin, *supra*, 15 U.C.L.A. L. Rev. at 34. As noted above, Ruffin's understanding of cause does not assist in determining whether a witness's testimony derived from a complex of causes should be excluded.

[31] As Prosser observes: "It should be quite obvious that, once events are set in motion, there is, in terms of causation alone, no place to stop." Prosser, *supra*, § 41, p. 239.

[32] Principles of proximate causation are deeply rooted in common notions of justice and play a significant role in our civil and criminal law. However, their role is primarily negative, in excusing individuals from responsibility for consequences they cannot be

On the other hand, if notions of free will were significantly determinative of the question of admissibility of witness testimony, there would be little left of the exclusionary rule. It would be a rare case in which a prosecutor could not find a police officer who, with as much free will as could ever be required to "break the causal chain," would be willing to testify to exactly what he discovered in the course of an unlawful search or interrogation.[32a] Apart from that obvious problem, resort to "free will" analysis with respect to the more difficult question of the third-party witness has resulted in diametrically opposed results among lower court decisions, each on the basis of a rationale largely irrelevant to the policies of the exclusionary rule. Some courts have admitted a witness's testimony on the basis of evidence that the witness was willing from the outset to testify and that the resulting testimony was therefore the product of the witness's intervening act of free will.[33] Other

said to have proximately caused, although their acts may have established the necessary condition. If a person invites another for dinner, and the guest is run down by a reckless driver on the way to the engagement, we do not hold the first person responsible for wrongful death or murder. Similarly we do not hold police officers responsible for Wong Sun's confession, although he may not have confessed but for their illegal acts several days before. See also *United States* v. *Bayer*, 331 U.S. 532, 540.

[32a] As we indicate below, p. 49, we believe that kind of testimony should not be admissible. Our point is simply that whether testimony of that kind should be admitted can only be answered with reference to the deterrence policies of the exclusionary rule; it cannot be answered with reference to the degree of the witness's free will in giving the testimony. It should also be emphasized that this case does not involve that kind of testimony.

[33] *E.g.*, *McLindon* v. *United States; People* v. *Scharfstein;* cf.

courts, however, have found evidence of the witness's free will in the fact that the witness was originally resistent to testifying but subsequently changed his mind, as the result, for example, of prosecutorial grants of immunity.[34] Still other courts have concluded that the witness lacked free will on the basis of the same kind of evidence—that is, pressures or inducements by the prosecution to testify.[35] Those disparities have led one leading commentator on the subject to state, correctly in our view, that resort to free will analysis has enabled at least one court—

> to resolve the taint issue in any way it saw fit simply through manipulation of mentalistic entities. Something in the record on appeal could usually be found to show the workings or non-workings of the will consistently with some preconceived notion of how the issue should be decided.[36]

Lockridge v. *Superior Court;* but see *Smith* v. *United States* (testimony excluded because the witness's story remained unchanged), all cited at n. 28, *supra.*

[34] *E.g.*, *United States* v. *Scios; United States* v. *Marder; Smith* v. *United States; Edwards* v. *United States; Parker* v. *Estelle; United States* v. *Hoffman; United States* v. *Evans; United States* v. *Beasely*, all cited at n. 28, *supra.*

[35] *United States* v. *Karathanos; United States* v. *Tane; Brown* v. *United States; Smith* v. *United States*, all cited at n. 28, *supra.*

[36] Ruffin, *supra*, 15 U.C.L.A. L. Rev. at 52. Ruffin concluded that "the will and volition concepts as employed in the *Smith & Bowden* line of cases are spurious and unnecessary, and can be manipulated, whatever the facts or merits of the case, to justify any decision deemed a priori desirable." *Id.* at 64.

We agree. Like causation, the concept of volition rests on murky philosophical premises and is of limited utility in judicial analysis. Individuals decide to testify or to make statements as the result of a complex of pressures, some internally generated (*e.g.*, desires

See also *United States* v. *Alston*, 311 F. Supp. 296 (D. D.C.)[37]

B. Exploitation of the illegality

Similarly, the concept of obtaining derivative evidence by "exploitation of [the primary] illegality" set forth in *Wong Sun* and *Brown* v. *Illinois* has limited usefulness in this context unless it is more narrowly defined. To the extent that the concept of "exploitation" focuses upon the question whether the police engaged in the primary illegality for the very purpose of obtaining the evidence in question

to unburden guilt, to gain favor with authority, or to be a good citizen), and some externally generated (*e.g.*, threats of contempt or deportation or promises of leniency). To say that a statement should be suppressed as not sufficiently a product of free will is simply to state the conclusion that the government's contribution to the complex of factors resulting in the statement or testimony is impermissible as a matter of legal or constitutional policy. The inquiry, therefore, should ask whether as a matter of policy it is permissible to put pressure on a witness to testify (*e.g.*, by threat of contempt) or whether suppression of the testimony would significantly deter other constitutional violations—not whether a witness's testimony is some absolute sense a product of free will.

[37] In that case, Judge Gesell, in suppressing a witness's testimony, observed: "Since it appears that the result in 'tainted witness' cases depends more on the particular panel sitting than anything else, there is as yet no clear guidance for the trial court from the Court of Appeals. Accordingly, it is necessary to return to the fundamental theory of the exclusionary rule in disposing this case." 311 F. Supp. at 298. While we agree with Judge Gesell that the question must be resolved with reference to the policies of the exclusionary rule, we disagree with his conclusion that the rule requires the suppression of testimony whenever it can be said that the witness might not have testified but for the illegality.

(as appeared to be the case in *Brown*), then the concept properly relates to the purposes of the exclusionary rule and serves a useful function in connection with live-witness testimony as well as other kinds of evidence (see pp. 60–61, *infra*.). But if exploitation is broadly equivalent to "use" and thus encompasses all circumstances in which, on the basis of information illegally obtained, the government pursues its investigation, follows leads, and ultimately seeks to introduce some derivative evidence, then the concept would swallow up the principle of attenuation. An attempt to introduce any derivative evidence, however remote, could be said to constitute an exploitation of the primary illegality. In sum, "exploitation" in this latter sense is a perjorative term with little descriptive content; it precludes the *improper* use of information without indicating what use is improper.[38]

[38] This concept has also engendered confusion in the courts of appeals, particularly in cases where a witness identified as a result of an illegal search is induced or pressured to testify by the government. As noted above (nn. 34, 35, *supra*), in some cases, the witness's change of attitude has been seen as evidence of an intervening act of will, and the testimony has been admitted, while other cases have reached the opposite conclusion. Ruffin attempts to harmonize those cases on the ground that the former involve the government's exploitation of some secondary illegality, while the latter involve exploitation of the primary illegality—that is, implicitly threatening the witness with prosecution on the basis of the evidence discovered in the illegal search. Ruffin, *supra*, 15 U.C.L.A. L. Rev. at 60–61. Whether the cases bear such analysis is doubtful. See *United States* v. *Scios*, *supra*, n. 28. But if it is permissible (and "nonexploitative") to pressure or induce a witness to testify (*e.g.*, by simple subpoena) on the basis of information lawfully obtained,

c. Temporal proximity

Finally, temporal proximity, another factor identified in *Brown,* is not readily applicable to the question of a witness's trial testimony. If the relevant time frame is the period between the illegality and the witness's decision to supply the useful evidence (*i.e.,* the witness's act of testifying)—as application of *Brown* analysis to this context would suggest [11]—then considerations of temporal proximity would almost always militate in favor of admitting witness testimony, even if the testimony did no more than describe the evidence discovered in the search.

3. A case-by-case attenuation inquiry fails to give proper weight to exclusionary rule policies

In view of the limitations of the analysis suggested in *Wong Sun* and *Brown* as applied to this context,

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that conduct does not become "exploitative" simply because the information was unlawfully obtained, any more than it would be "exploitative" to prosecute a culpable witness on the basis of tainted evidence that he had no standing to challenge. Whether that witness's testimony should be suppressed depends on the deterrence policies of the exclusionary rule, not whether the means of obtaining the testimony could be called "exploitative."

[11] In *Brown*, the time lapse between the initial unlawful arrest and the confession was regarded as a relevant indicator of whether the confession was the result of an intervening act of free will. In the case of live-witness testimony, the evidence challenged is the testimony of the witness. If temporal proximity is relevant in determining whether that evidence is the product of an intervening act of free will, the relevant period should be between the primary illegality and the witness's exercise of his will in furnishing the evidence.

we submit that the inquiry with respect to live-witness testimony should not be whether, as an *a priori* and philosophical matter, a witness's testimony can be said to have a sufficient causal relationship with the primarily illegality or instead is more "directly" the result of intervening causes. Rather, the inquiry should focus directly on the policies of the exclusionary rule and should consider whether the deterrence benefits of excluding live-witness testimony outweighs the public interest in its admission. That is, rather then deciding each case on the basis of the volitional and causative factors suggested in *Wong Sun* and *Brown,* this Court should determine and declare whether, as a matter of policy, this type of evidence should be admitted or excluded.

This Court has adopted the kind of policy approach that we suggest here in a number of exclusionary rule contexts. Thus, with respect to standing, the Court has established as a matter of policy that evidence shall not be excluded if it was obtained through the violation of the constitutional rights of someone other than the person challenging its admission. That rule is based in large part on the Court's assessment of the deterrence benefits of exclusion in those circumstances generally (see *Alderman* v. *United States,* 394 U.S. 165, 174–175), and the Court has not undertaken to determine whether, in each case, exclusion would in fact have deterred the misconduct. The Court has taken a similar approach to precluding or limiting

the retroactive effect of decisions involving new applications of the exclusionary rule. See *United States* v. *Peltier*, 422 U.S. 531, 536–539.[40]

Moreover, apart from the limitations we have suggested in the utility of the *Wong Sun-Brown* criteria, there are several significant advantages in considering the question of live-witness testimony

[40] We find, in addition, significant support for approaching this inquiry directly in terms of exclusionary rule policy in a number of other decisions of this Court that can be said, at least in a sense, to deal with the consequences of police misconduct. First, in *Frisbie* v. *Collins*, 342 U.S. 519, the Court rejected the contention that a defendant could not be prosecuted for a crime in Michigan after he had been kidnapped in Illinois by Michigan officers and returned to Michigan for prosecution. Although the defendant's constitutional and legal rights had clearly been violated and although prohibiting his prosecution may well have served to deter similar police conduct in the future, the Court did not pause to consider the causal nexus between that conduct and the prosecution, but simply decided as a matter of policy that "a guilty person rightfully convicted * * * [cannot] escape justice because he was brought to trial against his will." 342 U.S. at 522. In our view, the policy considerations against forever tainting a witness on the basis of the means by which that witness was discovered are very similar to the policies against forever tainting jurisdiction over a defendant on the basis of the means by which he was brought to trial.

Second, in *Michigan* v. *Tucker*, 417 U.S. 433, the Court held admissible the trial testimony of a witness whose identity was disclosed by the defendant's statement made after inadequate *Miranda* warnings. Although the defendant's statement itself was not admissible, the Court did not inquire whether the witness's testimony was sufficiently attenuated from the primary illegality in *Wong Sun* or *Brown* terms; rather it simply decided as a matter of exclusionary rule policy that the deterrent effect of the rule would not be "significantly augmented by excluding the testimony of the witness Henderson as well." 417 U.S. at 448.

directly in terms of exclusionary rule policy. First, such an inquiry focuses primarily on the motivations of the police before the fact rather than the motivations of the witness after the fact, and thus relates directly to the purposes of the exclusionary rule.[41] Indeed, while the approach we suggest for cases involving live-witness testimony may be different from that of other fruits and attenuation cases, the underlying principle is the same, as Mr. Justice Powell suggested, concurring in *Brown* (422 U.S. at 610).

> The basic purpose of the [exclusionary] rule, briefly stated, is to remove possible motivations for illegal arrests. Given this purpose, the notion of voluntariness has practical value in deciding whether the rule should apply to statements removed from the immediate circumstances of the illegal arrest. * * * [T]he police normally will not make an illegal arrest in the hopes of eventually obtaining a truly volunteered statement.[42]

[41] See *United States* v. *Guana-Sanchez*, 484 F. 2d 590, 594 (C.A. 7), certiorari granted, 417 U.S. 967, certiorari dismissed as improvidently granted, 420 U.S. 513 (Pell, *J.*, dissenting): "I have some conceptual difficulty in determining how an exclusionary rule designed to control police behavior can be applied on a case-by-case basis as *Smith* [v. *United States*, 344 F. 2d 545 (C.A.D.C.)] would have us do. I am certain that police officers would have an even greater difficulty in determining whether a possible witness's testimony was attenuated from illegality."

[42] See also, *Harrison* v. *United States*, 392 U.S. 219, 231–233 (White, *J.*, dissenting).

Second, the kind of case-by-case determinations suggested in *Wong Sun* and *Brown* add substantial burdens to the administration of criminal justice. As one commentator has observed, resolution of the live-witness problem should reflect "a concern for the limits to which judicial machinery can sustain the time-consuming demands and stresses of solving complex fact problems which are collateral to ultimate questions of fact." Ruffin, *supra*, 15 U.C.L.A. L. Rev. at 78–79. Cf. *United States* v. *Robinson*, 414 U.S. 218, 235.

B. THE POLICIES OF THE EXCLUSIONARY RULE DICTATE THAT LIVE-WITNESS TESTIMONY SHOULD GENERALLY BE ADMITTED EVEN IF IN SOME SENSE IT IS A "FRUIT" OF AN ILLEGAL SEARCH

An inquiry focused directly on the policies of the exclusionary rule requires an identification, on the one hand of the effect of the admission or exclusion of the challenged evidence on the incentives to the police to commit or abstain from a primary illegality, and, on the other, the cost to society of excluding the evidence.[43] We submit that significant differences between live-witness testimony and other kinds of evidentiary "fruits" justify a refusal to extend the exclusionary rule (with certain specific exceptions

[43] Many of the factors discussed in *Wong Sun*, *Brown* and other cases remain relevant to this inquiry. Thus, as we discuss below, the fact that an unpredictable complex of motivations normally go into a witness's decision to testify or not to testify, which in *Wong Sun* terms might be called his free will, are relevant to determining whether the police have a significant incentive to conduct unlawful searches for the purposes of discovering potential witnesses. But what the witness's motivations actually were in a particular case has no bearing on the police's earlier decision to conduct the search (or their decision to conduct similar searches in future cases), and should not determine the exclusionary question.

discussed below) to the testimony of a witness about information known to that witness wholly independently of any police misconduct.

Before proceeding to identify those differences, it is important to specify at the outset what is not involved in our analysis and conclusions—namely, the testimony of a witness that describes illegally seized evidence or fruits of an illegal search that would otherwise be inadmissible under established principles of the exclusionary rules. To the extent that established principles of the exclusionary rule (including fruits, attenuation and independent source analysis) provide necessary deterrence of police misconduct, it is obvious that that deterrence would be substantially undermined if the prosecution could simply use a willing witness to describe otherwise tainted evidence. Our analysis and conclusions are confined to testimony of a witness concerning the witness's knowledge possessed independently of any illegal police conduct.[44]

[44] The distinction we are making here is between the situation in which the testimony of a witness is about facts learned by that witness as a result of an illegal search, which would be treated like any other evidentiary fruit, and that in which the witness

With that exception in mind, and on the basis of the inherent differences between testimonial and other evidentiary fruits discussed below, we submit that this Court should decide as a matter of exclusionary rule policy that the testimony of a witness whose identity or possession of relevant information was discovered as a result of an illegal search or seizure should not be excluded (1) except to the extent it describes other tainted fruits learned by the witness as a result of the misconduct and (2) unless the facts warrant the conclusion that the search was for the specific purpose of discovering potential witnesses.

We first consider the differences between testimonial evidence and other evidence in terms of the incentives of the police to develop such evidence through illegal searches or other misconduct, and we then examine the issue in terms of the cost of exclusion to the administration of justice.

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testifies to matters wholly independent of what the illegal search may have disclosed, and that testimony is challenged on the ground that governmental awareness of the witness's utility was the fruit of a constitutional violation (which is the present case). An intermediate case could arise in which the witness is testifying about matters disclosed during an illegal search, but on the basis of independent knowledge of that matter (*i.e.*, the witness would have been capable of testifying about the matter even if the search had never occurred). This case does not require the Court to decide how that intermediate situation should be treated, because the trial court excluded from its consideration any evidence concerning the envelope and its contents discovered by Biro (n. 6, *supra*), and because Hennessey did not testify about the contents; indeed, she testified she did not know what was in the envelope (A. 24).

1. A general rule admitting live-witness testimony will not substantially impair the deterrent effect of the exclusionary rule

The extent to which a police officer has an incentive to conduct an illegal search[45] for evidence depends primarily on (1) his expectation, or ability to foresee, that the search will uncover useful evidence and (2) his assessment of the likelihood that what he might discover could be ascertained in other ways. In those respects, the trial testimony of witnesses differs significantly from other kinds of evidentiary fruits.

Consider a typical example. The police suspect that a flower shop is being used as a front for a gambling operation, and they decide to search it surreptitiously to secure evidence of gambling offenses. The police may have the same level of expectation, or ability to foresee, that their search will disclose the identity of a possibly knowledgeable witness (for example, the name of a betting customer) as they have that it will disclose more direct evidence of the offenses (for example, betting slips and other gambling paraphernalia) or other kinds of leads (for example, check books that will lead them to bank accounts).[46] But the very nature of testimonial evidence renders it signif-

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[45] For convenience, the discussion that follows will be in terms of an illegal search, although the analysis applies equally to other kinds of misconduct, such as improper arrests and interrogations.

[46] Of course in many if not most cases the police do not actually expect or foresee that their search will uncover the particular items of evidence later challenged; rather they are usually motivated by a general expectation that their search will disclose useful evidence of some kind or another.

icantly less probable that the name of a potential witness will eventuate in useful evidence at trial than that any tangible evidence they find will be useful in a prosecution.

That is so because tangible evidence generally "speaks for itself," whereas, as Chief Justice (then Judge) Burger said in *Smith* v. *United States,* 324 F. 2d 879, 881–882 (C.A.D.C.):

> [T]he living witness is an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give. The uniqueness of this human process distinguishes the evidentiary character of a witness from the relative immutability of inanimate evidence [footnote omitted].

In our example, the police officers could reasonably expect that if their search uncovers betting slips, that evidence (but for the exclusionary rule) could be used effectively against the target of the search. But if they discover the name of someone who might have relevant information, they still face a long list of uncertainties before that name is translated into useful trial testimony. These include, but are not limited to, whether they can locate the individual; whether he will have useful information; whether he will divulge that information; whether he will remain available to testify at the time of trial; whether, if he is unwilling to testify, the prosecutor will be willing to grant him immunity; and whether, if all of the foregoing uncertainties eventuate favorably, the jury will find him

a credible witness. To those uncertainties must also be added the awareness of experienced police officers and prosecutors that witnesses, even in the best of circumstances, are all too often unwilling to "get involved" in the prosecution of a crime by disclosing information or testifying, either because of the inconvenience entailed, their general animus against law enforcement officers, the unpleasant prospect of exposure to hostile cross examination, or the risk of retaliation.[47] In short, it is unlikely that, in the ordinary case, the prospect of finding a useful witness adds significantly to the incentives of the police to conduct an unlawful search, or, conversely, that exclusion of the testimony of such a witness would significantly augment the existing deterrence provided by the exclusion of other types of evidence and its fruits.

With respect to incentives, it is also appropriate to consider the police officer's assessment of the likeli-

[47] As one student of this problem recently wrote, "Studies in Washington, using the computer-based Prosecutor's Management Information System, show that the chief cause of prosecution failure is that crucial witnesses stop cooperating with the authorities in mid-course." John Stein, *Enlisting Ourselves in the War on Crime*, The Washington Post, July 24, 1977, p. B1. Indeed, the reluctance of many witnesses to testify has compelled the government to establish a program to transfer and furnish new identities to many witnesses who have testified for the government in major prosecutions. Yet in the too infrequent instance of a witness (like Hennessey) who is willing to shoulder the burdens and risks, apparently through the purest motives of civic responsibility, the court below would establish a rule that the testimony cannot be heard.

hood that an item of useful evidence will or can be acquired through means other than unlawful searches. That consideration underlies the "inevitable discovery" exception to the fruits doctrine that the courts of appeals have developed and that applies to tangible as well as verbal and testimonial fruits. Under that doctrine, as summarized by one commentator, "where the court finds that the challenged evidence would have been eventually secured through legal means regardless of the improper official conduct, the inevitable discovery exception allows the evidence to be admitted." Note, *The Inevitable Discovery Exception To The Constitutional Exclusionary Rules*, 74 Colum. L. Rev. 88 (1974).[48] The courts of appeals have applied that doctrine cautiously and have required a strong showing by the government that the evidence would inevitably have been disclosed. On the facts of this case, the two courts below found that Hennessey's testimony would not have been inevitably discovered within the ambit of that doctrine, and we did not seek this Court's review of those findings (see *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635).

[48] See *Brewer* v. *Williams*, No. 76-1263 (March 23, 1977), in which the Court indicated that on retrial the *corpus delicti* "might well be admissible on the theory that the body would have been discovered in any event" (slip op. 18, n. 12). See also *United States* v. *Cole*, 463 F. 2d 163, 171–174 (C.A. 2), certiorari denied, 409 U.S. 942; *United States* v. *Falley*, 489 F. 2d 33 (C.A. 2); *United States* v. *Seohnlein*, 423 F. 2d 1051 (C.A. 4), certiorari denied, 399 U.S. 913; *Killough* v. *United States*, 336 F. 2d 929 (C.A.D.C.); *Wayne* v. *United States*, 318 F. 2d 205 (C.A.D.C.), certiorari denied, 375 U.S. 860.

Nevertheless, the likelihood that an item of evidence can be or will be obtained by legitimate means bears closely on the incentives of the police to engage in unlawful conduct to obtain it. And in that respect a witness's trial testimony again differs significantly from other kinds of evidence. To the extent the police expect that witnesses exist who will be willing to testify to relevant events, the likelihood is almost always significantly greater that those witnesses can be or will be discovered in the normal course of investigation than that a comparably probative item of tangible evidence can be or will be so discovered.[49]

First, a witness, unlike tangible evidence, has the capacity to make himself be known, and the more the police have reason to expect that a useful witness exists, the more likely it is that such a witness will

[49] Some courts and commentators have criticized the inevitable discovery exception on the ground that "[s]uch a rule would relax the protection of the right of privacy in the very cases in which, by the government's own admission, there is no reason for an unlawful search. The better the government's case against an individual, the freer it would be to invade his privacy." *United States* v. *Paroutian*, 299 F. 2d 486, 489 (C.A. 2). See also Note, *supra*, 74 Colum. L. Rev. at 99. The same argument could be made against the contention we advance here, but the argument rests on a fundamental fallacy. The purposes of the exclusionary rule are remedial and forward-looking; its harsh remedy must be carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States* v. *Calandra*, *supra*, 414 U.S. at 348. Thus, delineation of the scope of the rule must focus on the incentives of the police to commit an act before it occurs, since this rule was not designed simply to punish the police (and society) after the fact for having done an unnecessary act.

come forward. Second, identification of likely witnesses to criminal acts is a normal subject of any investigation, and witnesses, unlike tangible evidence, can usually be sought out and interviewed without the necessity of a search—legal or illegal. This case presents an illustrative example. Hennessey, as well as respondent's other employees, were obvious subjects for questioning by officers investigating respondent's gambling activities, and indeed some of respondent's other employees were interviewed (Pet. App. 30a). The only reason a fruits question arises in this case at all is that a prior investigation of respondent had been discontinued a year earlier and, by happenstance, Biro's search disclosed evidence that respondent was engaging in a crime (and that Hennessey knew something about it) and thus revivified the investigation. But that happenstance does not suggest that Biro's search was in any way motivated by a desire to discover useful witnesses; nor does it affect the general proposition that, given sufficient suspicion to prompt an investigation, police have significantly less incentive to search for witnesses by unlawful means than to search for other evidence by unlawful means.[50]

[50] Indeed, there is even more reason not to exclude derivative evidence in a case where, as here, the police misconduct discloses for the first time that a crime has been or is being committed and thus prompts an investigation. If the fruits of that investigation were to be excluded as tainted by the initial illegality, the crime could almost never be punished because the government could almost never prove that these fruits had an independent source. But as Judge Hand said on the remand of the *Nardone* case, the government is not required to show that illegally obtained information "has not itself spurred the authorities to press an investigation which they might otherwise have dropped. We do not believe that the Supreme Court meant to involve the prosecution of crime in such a tenebrous and uncertain inquiry, or to make such a fetich [sic] of the statute as so extreme an application of it would demand." 127 F. 2d at 523. Subsequently, however, the Second Circuit, applying a strict causation analysis to fruits questions, appears to have adopted precisely that inquiry. *United States* v. *Falley*, 489 F. 2d 33, 41; *United States* v. *Cole*, 463 F. 2d 163, 172, certiorari denied, 409 U.S. 942; *United States* v. *Schipani*, 414 F. 2d 1262, 1266, certiorari denied, 397 U.S. 922.

In sum, while we do not contend that exclusion of witness testimony would provide no marginal deterrence, the inherent differences between that and other kinds of evidence support the common sense conclusion that the police have significantly less incentive to secure that type of evidence through unlawful searches or other misconduct, and, consequently, that application of the exclusionary rule to such testimony would provide significantly less deterrence benefits than other applications of the exclusionary rule that have been approved by this Court.

2. Exclusion of live-witness testimony is more costly to the administration of justice

On the other side of the balance, the exclusion of the testimony of a witness has a greater impact on society's ability to enforce the law than the exclusion of other kinds of evidence. Tangible evidence and verbal confessions, which speak for themselves, have a finite scope. Exclusion, though critical to the outcome of some cases, thus has a relatively limited impact that may in some sense be deemed proportionate to the official wrong giving rise to the exclusion.

On the other hand, disabling a witness and all that witness may know about the defendant's prior criminal activities, however unrelated to the purpose of the search or the evidence discovered by the search, would usually impose a cost far out of proportion to the infraction that exclusion is designed deter.[51] In this respect, the Court's observations in *United States* v. *Bayer,* 331 U.S. 532, made in another context, are pertinent. The Court held in *Bayer* that the defendant's voluntary confession, made six months after a similar but involuntary confession, was not an excludable fruit of the first, and observed (331 U.S. at 540):

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. * * *

[51] As McCormick states, "The rules which disqualify witnesses who have knowledge of relevant facts and mental capacity to convey that knowledge are serious obstructions to the ascertainment of truth. For a century the course of legal evolution has been in the direction of sweeping away these obstructions." McCormick on *Evidence*, § 71, p. 150 (1954).

By the same token, the Court has never perpetually disabled a witness from providing useful testimony simply because "in a sense" the testimony may be the fruit of some police misconduct. See *Michigan* v. *Tucker, supra.* Cf. *Frisbie* v. *Collins,* 342 U.S. 519; and n. 40, *supra.*

Another consideration that weighs in favor of greater liberality in admitting the testimony of a witness about matters known to the witness independent of any illegal search is the defendant's lesser privacy interest in that kind of evidence. While individuals have a substantial, constitutionally recognized expectation of privacy in their persons, houses, and effects and in the matters that invasions of those private areas may reveal, they ordinarily have no recognized privacy interest in information disclosed by them to or otherwise possessed by third parties. See, *e.g., United States* v. *White,* 401 U.S. 745; *Hoffa* v. *United States,* 385 U.S. 293. Consequently, while the act of introducing illegally seized physical evidence at trial will frequently entail a renewed invasion of privacy,[52] a third party's testimony would rarely trench upon such interests, because it would relate to matters known by the witness wholly independently of any illegal search.

[52] It is on this principle that 18 U.S.C 2510 *et seq.*, which regulates electronic surveillance, prohibits not only unauthorized interception of communications but equally their subsequent disclosure.

C. THE TESTIMONY OF A WITNESS SHOULD BE EXCLUDED ONLY IF THE EVIDENCE ESTABLISHES THAT THE ILLEGAL SEARCH WAS MOTIVATED BY THE SPECIFIC PURPOSE OF DISCOVERING THE NAMES OF POTENTIAL WITNESSES

Our discussion thus far has focused on the typical situation, in which the discovery of the identity of a potential witness is more or less incidental to police misconduct. In some cases, however, the police may engage in some unlawful act for the specific purpose of discovering potentially useful witnesses. Where the evidence supports such a finding, exclusion of the witness's testimony may be appropriate and necessary to deter similarly motivated misconduct in the future.[53]

It would be inappropriate here to try to delineate all the circumstances that would fit within this exception.[54] It is clear, in any event, that such an exception would not apply in this case. The evidence established that Officer Biro's search of the envelope was not for the purpose of discovering witnesses, since he had

[53] Such a case may well be illustrated by *United States* v. *Karathanos*, 531 F. 2d 26 (C.A. 2), certiorari denied, 428 U.S. 910, where, as the affidavit supporting a search warrant reflected, federal agents searched a restaurant for the specific purpose of discovering illegal aliens and subsequently sought to use the aliens' testimony against the restaurant owner. The same is true in the border-area traffic search or stop cases, *e.g.*, *United States* v. *Brignoni-Ponce*, 422 U.S. 873.

[54] While such an exception would no doubt generate questions of proof concerning the intentions of the police, those questions would be no more difficult than attempting to ascertain the state of mind or free will of a witness and would be more related to the purposes of the exclusionary rule.

no prior knowledge of respondent's gambling activities. Indeed, the search can hardly be said to have been for any purpose; it was plainly an unconsidered act of curiosity prompted by his seeing an envelope containing some money. To exclude Hennessey's testimony on the basis of that act would not serve the deterrent purposes of the exclusionary rule.

D. THE TESTIMONY OF LOIS HENNESSEY SHOULD NOT HAVE BEEN SUPPRESSED UNDER THE *WONG SUN* AND *BROWN* ATTENUATION ANALYSIS

We have argued above that the question of live-witness testimony should be decided as a matter of exclusionary rule policy rather than on the basis of the approach suggested in *Wong Sun* and *Brown*—that is, an *ad hoc* determination in each case whether the testimony was sufficiently an act of free will to break the causal chain, whether the police had impermissibly exploited the primary illegality, and whether police conduct could be said to be purposeful or flagrant. If the Court disagrees with our approach, however, we submit that the testimony of Hennessey should not have been suppressed under the standards set forth in *Wong Sun* and *Brown*.

First, Hennessey's decision was clearly the product of her own free will. When she was first interviewed by Agent Emory four months after the search, she expressed a ready willingness to cooperate based on her interest in police science, and she testified that

the incident of the search played no part in that willingness because it was not even on her mind when Emory first spoke to her.

Second, with respect to temporal proximity to the search, Hennessey was not contacted until four months later and did not testify at trial until six months later.

Third, in no sense can the government be said to have exploited the illegal search. When Emory decided to interview Hennessey (as well as other employees in respondent's shop), all he knew was that the local police believed her to be knowledgeable; he did not know how they came by the knowledge or anything about Officer Biro's search.

Finally, Officer Biro's search of the envelope, while hardly commendable, was certainly not a flagrant or purposeful invasion of respondent's Fourth Amendment rights. The envelope was in plain view in an area (behind the counter) which, although technically reserved for employees, was accessible to the public and into which customers of the store might be expected to enter from time to time. Furthermore, the envelope had money protruding from it, and without excusing Officer Biro's curiosity, respondent himself must bear some responsibility for the brief inspection that resulted.

In short, to the extent the criteria set forth in *Wong Sun* and *Brown* v. *Illinois* are determinative, Hennessey's testimony should not have been suppressed as the fruit of Officer Biro's search.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded to the district court with instructions to reinstate the court's finding that respondent was guilty of violating 18 U.S.C. 1623.

Respectfully submitted.

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AUGUST 1977.

U.S. GOVERNMENT PRINTING OFFICE: 1977